STATE OF MICHIGAN

COURT OF APPEALS

KURT TERAMO,

Plaintiff-Appellee,

v

CITY OF GRAND RAPIDS,

Defendant-Appellant.

UNPUBLISHED
April 19, 2012

No. 304301
Kent Circuit Court
LC No. 10-06990-NO

Before: BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this highway exception to governmental immunity case under the governmental tort liability act (GTLA) MCL 691.1401, et. seq., defendant, City of Grand Rapids, appeals the denial of its motion for summary disposition based on MCR 2.116(C)(7) (claim barred by governmental immunity). We affirm.

On August 7, 2009, plaintiff Kurt Teramo was driving his moped to a meeting within the city of Grand Rapids, Michigan. He was traveling north along Broadway Alley which is a gravel surface that forms a "T" intersection with a paved street that runs east/west called Clover Court. As he made a right turn at the intersection, his moped struck a hole that had eroded around a storm drain. The drain was located within the gravel portion of the roadway and was in the middle of this intersection. Plaintiff was thrown from his moped and seriously injured.

Plaintiff filed suit against defendant alleging a violation of the GTLA under MCL 691.1402 (which requires that, "each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.") Defendant filed a motion for summary disposition claiming governmental immunity under MCR 2.116(C)(7) and alleging that there was no genuine issue of material fact under MCR 2.116(C)(10). The trial court denied these motions, finding that a decision on whether the highway exception applied was premature and that there was a genuine issue of material fact as to whether the site of the accident was in the alley or on Clover Court.

We review de novo the circuit court's grant of a defendant's motion for summary disposition. *Burise v Pontiac*, 282 Mich App 646, 650; 766 NW2d 311 (2009). MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law and requires consideration of all documentary evidence filed or submitted by the parties. *Id.* A plaintiff can overcome such a motion for summary disposition by alleging facts that support the application of

an exception to governmental immunity. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001); see also *Burise*, 282 Mich App at 650.

Defendant argues that the trial court erred when it denied its motion for summary disposition under MCR 2.116(C)(7). We disagree.

The GTLA provides broad immunity for government agencies when they engage in governmental functions. *Burise*, 282 Mich App at 652. However, there are narrowly drawn exceptions to governmental immunity, which include the highway exception. A government agency is required to maintain the area of a highway under its jurisdiction. MCL 691.1402(1) provides:

> Except as otherwise provided in section 2a, each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. [MCL 691.1402(1).]

As a panel of this Court noted in Sharp v City of Benton Harbor, 292 Mich App 351, 355-356; 806 NW2d 760 (2011):

> In defining the term "highway," the Legislature set forth examples of structures both included within and excluded from the statutory meaning: " 'Highway' means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway," but "does not include alleys, trees, and utility poles." MCL 691.1401(e). The question before us is whether the Legislature intended that the word "highway" encompasses curbs. "When used in the text of a statute, the word 'includes' can be used as a term of enlargement or of limitation, and the word in and of itself is not determinative of how it is intended to be used." *Frame v Nehls*, 452 Mich 171, 178–179, 550 NW2d 739 (1996). In *Frame*, the Supreme Court interpreted the term "includes" in a limited fashion, "[i]n light of the statute's text and legislative history." *Id.* at 180.
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> "[C]ontext matters, and thus statutory provisions are to be read as a whole." *Robinson v Lansing*, 486 Mich 1, 15, 782 NW2d 171 (2010). We find that the Legislature's decision to list structures both included within and excluded from the definition of "highway" signals that yet-unidentified structures could fall within the definition of "highway." Alternatively stated, the Legislature intended as illustrative rather than exhaustive the list of structures it "included" within the definition of "highway." By setting forth examples of structures both falling under and outside the definition of "highway," the Legislature contemplated that neither list should be considered complete. Our conclusion comports with the Supreme Court's characterization of the definition of "highway" in MCL 691.1401(e) as "broad." *Nawrocki*, 463 Mich at 182 n 37. [*Id*. at 355-356].

Defendant argues that the trial court contradicted itself when it determined that Broadway Alley is not a "highway" under MCL 691.1402 and MCL 691.1401(e), while at the same time concluding that the storm drain and the surrounding gravel might actually be part of Clover Court. This is not inconsistent because plaintiff presented facts which support his contention that the area at issue is actually a part of Clover Court and not a part of Broadway Alley.

In *Stamatakis v Kroger Co*, 121 Mich App 281, 284-285; 328 NW2d 554 (1982), a slip-and-fall accident occurred in a city-owned access way. This Court provided and applied the standard governing delineation between a highway excepted from immunity and a nonexcepted alley:

> The government's duty to maintain the highways in reasonable repair so that they are reasonably safe and convenient for public travel does not extend to alleys. The term "alley" must be defined with due regard for the Legislature's intent in using it. In the present case, defendant supported its claim (that the place in which plaintiff fell was an alley) by presenting an affidavit concerning a review of the Wayne County Bureau of Taxation base map of the area. The map allegedly showed that the place was a "dedicated public alley." By itself, this showing was insufficient to defeat, as a matter of law, plaintiff's claim that the dedicated alley had become a highway by use and custom. We do not hold that a plaintiff's claim that an alley has become a highway usually presents a question for the trier of fact. We hold only that defendant's proof that the place had been dedicated as an alley was not dispositive. If plaintiff can prove that the physical characteristics and pattern of use of the place are those of a highway, not those of an alley, she may be entitled to claim avoidance of the defense of governmental immunity. [*Stamatakis*, 121 Mich App at 285]

While the *Stamatakis* decision is similar to this case in that it involved a portion of roadway with a contested designation, the main point relevant to our case was described by the panel in *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 126; 463 NW2d 442 (1990). The *Ward* Court noted that the trial court in *Stamatakis* had erred in its belief "that the formal designation of the access way as an alley was conclusive as a matter of law of its status." *Id.* Here, the trial court correctly determined that a formal designation as to the disputed portion of roadway was not a matter conclusively established by law, but a matter of fact that was unresolved and therefore not appropriate for summary disposition.

Plaintiff submitted testimony from an expert witness who concluded in his affidavit that, "the storm drain is located on the improved portion of Clover Court designed for vehicular travel." Plaintiff also submitted evidence from the deposition of Christine Barfus, a right-of-way agent for the City of Grand Rapids, that for purposes of Public Act 51, the City would measure Clover Court by adding up the length of the frontage of the lots adjacent to Clover Court, and then "go to the center line of Broadway on the east and the center line of Broadway Avenue on the west." In addition, plaintiff used the testimony of Darrell Vanderkooi, the assistant public works director of the Grand Rapids public works department, who stated that for purposes of snow plowing, if there is an intersection between an alley and a street, the intersection is considered to be a part of the street and will be plowed.

Additionally, plaintiff presented a 1950 improvement plan for Clover Court that showed that although the storm drain was shown to have originally been a part of the alley, the improvement plan indicated that at the point that the pavement stopped, cobblestones were to be placed around the existing catch basin in Broadway Alley and into the intersection. It was this plan, plaintiff argued, that changed the storm drain from being a part of Broadway Alley to becoming a part of the improved portion of Clover Court. These facts provide a sufficient basis for concluding that summary disposition was not appropriate.

Affirmed.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Amy Ronayne Krause